

STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

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In re:) 1998 OAL Determination No. 9
Request for Regulatory)
Determination filed by) [Docket No. 91-004]
BERNARD GORDON regarding)
DEPARTMENT OF) July 27, 1998
CORRECTIONS, PELICAN BAY)
STATE PRISON rule) Determination Pursuant to
concerning the inmate) Government Code Section
grievance process for filing) 11340.5; Title 1, California
employee misconduct) Code of Regulations,
complaints ¹) Chapter 1, Article 3
_____)

Determination by: EDWARD G. HEIDIG, Director

HERBERT F. BOLZ, Supervising Attorney
DEBRA M. CORNEZ, Staff Counsel
Regulatory Determinations Program

SYNOPSIS

The Office of Administrative Law ("OAL") was requested to determine whether the following Pelican Bay State Prison rule is a "regulation" and is therefore without legal effect unless adopted in compliance with the APA: an inmate's grievance concerning employee misconduct will not be processed unless the inmate first attempts to resolve the grievance informally with the employee involved.

OAL has concluded that this grievance processing rule is not a "regulation" because it does not apply to inmates statewide; it thus need not be adopted pursuant to the APA.

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ISSUE

The issue presented to the Office of Administrative Law ("OAL") is whether the Pelican Bay State Prison rule that an inmate's grievance concerning employee misconduct will not be processed unless the inmate first attempts to resolve the grievance informally with the employee involved is a "regulation" required to be adopted pursuant to the APA.²

ANALYSIS

Bernard Gordon was an inmate at California Pelican Bay State Prison ("P.B.S.P."). He filed an inmate grievance with P.B.S.P. concerning employee misconduct by a correctional officer, but P.B.S.P. refused to further process the grievance stating that Mr. Gordon had not first attempted to resolve the grievance informally with the employee involved.

Mr. Gordon argued that departmental regulations waive the prerequisite that grievances be first attempted to be resolved informally with the employee involved when the grievance concerns employee misconduct.³ Mr. Gordon alleged that P.B.S.P. was enforcing a rule that was not in compliance with departmental regulations. He filed a request⁴ with OAL to determine whether the Pelican Bay State Prison rule that an inmate's grievance concerning employee misconduct will not be processed unless the inmate first attempts to resolve the grievance informally with the employee involved is a "regulation" required to be adopted pursuant to the APA.⁵

The analysis of this question follows.

I. IS THE APA GENERALLY APPLICABLE TO THE DEPARTMENT OF CORRECTIONS' QUASI-LEGISLATIVE ENACTMENTS?

Penal Code section 5058, subdivision (a) declares in part that:

"The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. . . . The rules and regulations *shall be promulgated and filed pursuant to [the APA]*. . . . [Emphasis added.]"

Clearly, the APA generally applies to the Department's quasi-legislative enactments.⁶ After this request was filed, Penal Code section 5058 was amended to include several express exemptions from APA rulemaking requirements. (See section 5058, subdivisions (c) and (d)). The applicability of one of these exemptions will be discussed below.

II. DOES THE CHALLENGED RULE CONSTITUTE A "REGULATION" WITHIN THE MEANING OF GOVERNMENT CODE SECTION 11342?

Government Code section 11342, subdivision (g), defines "regulation" as:

"...every rule, regulation, order, or standard of general application *or* the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by *any* state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure [Emphasis added.]"

Government Code section 11340.5, authorizing OAL to determine whether agency rules are "regulations," and thus subject to APA adoption requirements, provides in part:

"(a) *No* state agency shall issue, utilize, enforce, or attempt to enforce *any* guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in subdivision (g) of Section 11342, *unless* the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]. [Emphasis added.]"

In *Grier v. Kizer*,⁷ the California Court of Appeal upheld OAL's two-part test⁸ as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (g):

First, is the challenged rule either:

- a rule or standard of general application, *or*

- a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either:

- implement, interpret, or make specific the law enforced or administered by the agency, *or*
- govern the agency's procedure?

If an uncodified rule fails to satisfy either of the above two parts of the test, we must conclude that it is *not* a "regulation" and *not* subject to the APA. In applying the two-part test, however, we are guided by the *Grier* court:

"... because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead, supra*, 22 Cal.3d at p. 204, 149 Cal.Rptr. 1, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA*. [Emphasis added.]"⁹

A. IS THE CHALLENGED RULE A "STANDARD OF GENERAL APPLICATION?"

Standard of General Application--Rules Applying to Prisoners

For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.¹⁰

However, a different approach is taken in the case of rules applying to prisoners. California courts have long distinguished between: (1) statewide rules and (2) rules applying solely to one prison.¹¹ In *American Friends Service Committee v. Procunier* (1973) (hereafter, "*Procunier*"),¹² a case which overturned a trial court order directing the *Director of the Department* to adopt *departmental* rules and regulations pursuant to the APA, the California Court of Appeal stated:

"The rules and regulations of the Department are promulgated by the

Director and are *distinguished from the institutional rules* enacted by each warden of the particular institution affected. [Emphasis added.]¹³

Procunier is especially significant because it was this case which the Legislature in essence abrogated by adopting the 1975 amendment to Penal Code section 5058 which specifically made the Department subject to the APA. The controversy was whether the statewide Director's Rules, the rules "promulgated *by the Director*" (emphasis added), were subject to APA requirements.¹⁴ The Director's rules were expressly distinguished in *Procunier* from "institutional rules enacted by each warden"

OAL has consistently taken the position, based on *Procunier*, that local prison rules are not subject to the APA. Since this request was filed, the Legislature has confirmed that "local" institutional rules are not subject to the APA. Since January 1, 1995, Penal Code section 5058, subdivision (c), has declared, in part, that:

"(c) The following are deemed *not* to be 'regulations' as defined in subdivision (b) [now subdivision (g)] of Section 11342 of the Government Code:

(1) *Rules* issued by the director or by the director's designee *applying solely to a particular prison or other correctional facility*, provided that the following conditions are met:

(A) All rules that apply to prisons or other correctional facilities throughout the state are adopted by the director pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

(B) All rules except those that are excluded from disclosure to the public pursuant to subdivision (f) of Section 6254 of the Government Code are made available to all inmates confined in the particular prison or other correctional facility to which the rules apply and to all members of the general public .
[Emphasis added.]"

This statutory language confirms that the Legislature intends for *local* prison rules to be exempt from APA adoption procedures, provided certain conditions are met.

The challenged rule does not apply statewide

If P.B.S.P. was doing no more than following the inmate grievance regulations in refusing to further process Mr. Gordon's grievance, then P.B.S.P. was merely applying existing law to a particular situation. This action would not meet the definition of "regulation" because P.B.S.P. was not further implementing or interpreting the law, rather it was just complying with the law.

However, if OAL were to assume that P.B.S.P. did not comply with the inmate grievance regulations, then OAL must proceed with the two-prong analysis described above.

At the time the request for determination was filed with OAL, the following significant sections of Title 15 of the California Code Regulations provided:

"3084.2. Appeal Preparation.

"(b) Informal attempt prerequisite. The inmate or parolee shall attempt to resolve the grievance informally with the involved staff, *unless excepted by sections 3084.5(a)(3) and 3084.7.* [Emphasis added.]

"3084.5. Levels of Appeal Review and Disposition.

"(a) Informal level. The informal level is that at which the appellant and staff involved in the action or decision attempt to resolve the grievance informally.

"(1) *Unless excepted pursuant to subsection (3)* the informal level is required before an appeal may be accepted for formal review.

"(2) When an appellant attempts to resolve an appeal at the informal level, the employee contacted by the appellant shall review and if practical resolve the grievance. The employee shall report the action taken in the response space provide on the appeal form, and shall sign

and date the form.

“(3) The informal level *shall be waived for appeal of:*

....

(E) *Exceptional circumstances* defined in section 3084.7. [Emphasis added.]¹⁵

“3084.7. *Exceptions to the Regular Appeal Process.*

“(h) *Employee Misconduct Appeals.*

“(1) After exhausting the departmental appeal process, an appellant may file charges with the State Personnel Board. Such charges must be filed within three years from the date of the alleged misconduct and must include the third level review documents.... [Emphasis added.]”

In his request for determination, Mr. Gordon alleged that P.B.S.P. did not follow departmental regulations concerning the inmate grievance process for filing employee misconduct complaints in that P.B.S.P. did not comply with sections 3084.5 and 3084.7; that P.B.S.P. erroneously refused to process his grievance further because he had not first attempted to resolve the employee misconduct grievance on an informal level with the employee involved. Mr. Gordon argued that P.B.S.P.’s refusal to further process his grievance violated the regulations because sections 3084.5 and 3084.7 require that the informal level be waived when the grievance involves an employee misconduct complaint. He further alleged “that P.B.S.P. is not following mandated procedure, but [is] instituting new procedure, incongruous with state law....”

If Mr. Gordon is alleging that P.B.S.P. requires *all* P.B.S.P. inmates who file complaints regarding employee misconduct to first attempt to resolve the grievance informally with the staff involved, then OAL needs to determine if this is a rule of general application.

OAL finds that the rule is *not* a rule of general application. Even assuming that P.B.S.P. required *all* P.B.S.P. inmates to first attempt to resolve employee misconduct complaints informally with the staff involved, this rule would

nonetheless fall under the "local rule" heading because it is not alleged that the challenged rule had statewide application.

OAL, therefore, concludes that the P.B.S.P. grievance processing rule is not a "regulation" within the meaning of the APA because it is not a rule or standard of *general* application, that is, it does not apply to inmates statewide.

Since the challenged rule does not meet the first part of the two-part test, it is not necessary to address the second part of the test.

CONCLUSION

For the reasons set forth above, OAL finds that the Pelican Bay State Prison rule that an inmate's grievance concerning employee misconduct will not be processed unless the inmate first attempts to resolve the grievance informally with the employee involved is not a "regulation" within the meaning of the APA, and thus does not violate Government Code Section 11340.5.

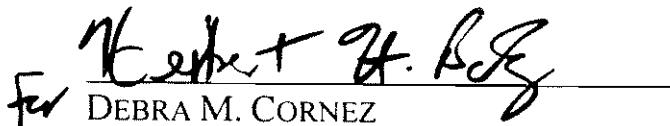
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ENDNOTES

1. This request for determination was filed by Bernard Gordon, D-85618, P.O. Box-29, C-8-207, Represa, CA 95671. The agency's response was submitted by Gregory W. Harding, Chief Deputy Director, Support Services, Department of Corrections, 1515 "S" Street, North Building, P.O. Box 942883, Sacramento, CA 94283-0001.
2. According to Government Code section 11370:

"Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370), Chapter 4.5 (commencing with Section 11400), and Chapter 5 (commencing with Section 11500) constitute, and may be cited as, the Administrative Procedure Act." [Emphasis added.]

We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Administrative Regulations and Rulemaking") of Division 3 of Title 2 of the Government Code, sections 11340 through 11359.
3. Mr. Gordon was referring to Title 15, California Code of Regulations, sections 3084.5 and 3084.7.
4. In his request for determination, Mr. Gordon states:

"The P.B.S.P. Appeal Coordinator's response: 'Lt. Lane has the right to respond on the informal level,' is inconsistent with the C.C.R. Title 15, sections [3084.5(a)(3)(E) and 3084.7(h)]. Therefore, I contend that P.B.S.P. is not following mandated procedure, but instituting new procedure, incongruous with state law.... [Emphasis added.]"
5. In its response, the Department states that the issues presented in the request for determination are:

"1. Whether Pelican Bay State Prison (PBSP) is subject to the provisions of California Code of Regulations (CCR), Title 15, Division 3, Sections 3084.5(a)(3)(E) and 3084.7(h) which relates to the filing of employee misconduct complaints. (NOTE: CCR section 3084.7, subsection (h) has since been amended....)

"2. Whether the issuance of a California Department of Corrections' (CDC) CDC Form 115, Rules Violation Report, filed against Bernard Gordon was in 'conflict of P.B.S.P.'s visiting guidelines.'"

The Department misstates the challenged rule at issue in this request for determination. The Department's response focuses on the events that were the *basis* for Mr. Gordon's *inmate grievance*, i.e., the events leading up to the alleged misconduct by the correctional officer, and whether Mr. Gordon was in violation of the Department's contraband regulations.

6. For a detailed description of the APA and the Department of Corrections' history, three-tier regulatory scheme, and the line of demarcation between (1) statewide and (2) institutional, e.g., "local rules," see **1992 OAL Determination No. 2** (Department of Corrections, March 2, 1992, Docket No. 90-011), California Regulatory Notice Register 92, No. 13-Z, March 27, 1992, p. 40.
7. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251. We note that a 1996 California Supreme Court case stated that it "disapproved" of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr. 2d 186, 198. *Grier*, however, is still good law, except as specified by the *Tidewater* court. Courts may cite on a particular point, cases which have been disapproved on other grounds. For instance, in *Doe v. Wilson* (1997) 57 Cal.App.4th 296, 67 Cal.Rptr. 2d 187, 197, the California Court of Appeal, First District, Division 5 cited *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596, on one point, even though *Poschman* had been expressly disapproved on another point nineteen years earlier by the California Supreme Court in *Armistead v. State Personnel Board* (1978) 22 Cal.3d 200, 204 n. 3, 149 Cal.Rptr. 1, 3 n. 3. Similarly, in *Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal.App.4th 677, 67 Cal.Rptr.2d 323, 332, the California Court of Appeal, First District, Division 4, nine months after *Tidewater*, cited *Grier v. Kizer* as a distinguishable case on the issue of the futility exception to the exhaustion of administrative remedies requirement.

Tidewater itself, in discussing which agency rules are subject to the APA, referred to "the two-part test of the Office of Administrative Law," citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer*.

8. The *Grier* Court stated:

"The OAL's analysis set forth a two-part test: 'First, is the informal rule either a rule or standard of general application or a modification or supplement to such a rule? [Para.] Second, does the informal rule either implement, interpret, or make specific the law enforced by the agency or govern the agency's procedure?' (1987 OAL Determination No. 10, *supra*, slip op'n., at p. 8.)

OAL's wording of the two-part test, drawn from Government Code section 11342, has been modified slightly over the years. The cited OAL opinion--1987 OAL Determination No. 10--was published in California Regulatory Notice Register 98, No. 8-Z, February

23, 1996, p. 292.

9. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253.
10. *Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552. See *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).
11. See *In re Allison* (1967) 66 Cal.2d 282, 292, 57 Cal.Rptr. 593, 597-98 (rules prescribed by Director include "D2601," Rules of the Warden, San Quentin State Prison include "Q2601"); *In re Harrell* (1970) 2 Cal.3d 675, 698, n.23, 87 Cal.Rptr. 504, 518, n.23 ("Director's Rule" supplemented by "local regulation"--Folsom Warden's Rule F 2402); *In re Boag* (1973) 35 Cal.App.3d 866, 870, n. 1, 111 Cal.Rptr. 226, 227, n. 1 (contrasts "local" with "departmental" rules). See also *Department of Corrections*, 20 Ops.Cal.Atty.Gen. 259 (1952) ("the rules and regulations of the Department of Corrections *and* of the particular institution. . . .") (Emphasis added.)
12. (1973) 33 Cal.App.3d 252, 109 Cal.Rptr. 22.
13. *Id.*, 33 Cal.App.3d at 258, 109 Cal.Rptr. at 25.
14. The dichotomy between institutional and statewide rules continues to be reflected in more recent cases, such as *Hillery v. Rushen* (9th Cir. 1983) 720 F.2d 1132, 1135. The *Hillery* court, though forcefully rejecting arguments that Chapter 4600 of the Administrative Manual did not violate the APA, carefully noted:

"This case does not present the question whether the director may under certain circumstances delegate to the wardens and superintendents of individual institutions the power to *devise particular rules* applicable solely to those institutions. Nor does it present the question whether the wardens and superintendents may promulgate such rules without complying with the APA. Although some institutions are exempted from certain provisions of the guidelines involved here, the guidelines at issue (1) were adopted by the Director of the Department of Corrections and (2) are of *general applicability*." (Emphasis added.) (720 F.2d at 1135, n. 2.)

15. In 1993, subsection(a)(3)(G) was added to section 3084.5 (California Regulatory Register 93, No. 6.) as follows:

"(3) The informal level shall be waived for appeal of:

"(G) Alleged misconduct by a departmental peace officer."